I’m So Busy Noticing
I’m Hard of Hearing

Allison Dunham*

To some of you I may have to apologize, and
that in itself may be something hard of hearing
in Washington. But I too got carried away by my
advisers. When Frank Ellsworth asked me whether
I would speak to you during my week at the Ameri-
can Law Institute, he reported that some of you
had seen my article, “Due Process and Commercial
Law,” in the last issue of the Supreme Court Review
and would like me to continue with that subject. I
readily acceded to this request in no small part, be-
cause it is a subject which interests me and plagues
me in legislative drafting. I find no fault with
the request.

Then Frank, remarking that my title was quite
technical, asked me to get a snappy title—one like
Wally Blum created for the equally boring subject
of taxation. I agreed to this and produced this title
of which, I frankly confess, I am very proud. My
trouble started when I tried to produce something
worthy of the title. I am mindful of the rule in the
Uniform Commercial Code that any description of
the goods creates an express warranty that the
goods shall conform to the description. I might
even be hung by the rule of implied warranties: a
person in the business of selling warrants that the
goods are of fair average quality. For, if Mr. Blum
is the standard of our Law School for fair average
quality lectures, then I am in breach—I neither wear
snappy neckties nor make snappy jokes.

I think I have a way out for myself with respect
to most of you. At the Law School annual alumni
dinner in Chicago the Dean told me he was pleased
that the old timers—Kalven, Meltzer, and Dunham—
were still around. So, I think I have an out also
from the UCC: when the buyer before entering into
the contract has examined the goods as fully as he
desired or has refused to examine the goods, there
is no warranty with regard to defects which an
examination ought to have revealed. As I look at
you, I think most of you examined my goods in first
year property. Either you refused to examine one
of my other courses or did examine them, and you
still want to buy today. So, I do not need to warrant
that my talk will conform to the title.

There is another problem, however, of which I
must dispose. Some of you graduated before Women’s
Lib was invented and some of you may be in-
clined to interpret any expression by a person my
age as the expression of a male chauvinist pig.
When I designed the title I did not think about
either group, but as I started to outline my talk I
began to wonder how many of you thought my talk

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paper was presented at the annual meeting of the
Washington District law alumni held in conjunction
with the American Law Institute, March 17, 1973.
was on women in the Law School, a relatively new phenomenon as far as quantity is concerned. Let us put that at rest at once. My “noticing” referred to in the title is sex-blind; I am talking about conflict and dispute in the real world.

Well, what is my topic? Its background is a series of Supreme Court cases, particularly Sniadach and Fuentes, which have led some commentators and lawyers with clients to assert that no contract can be arranged so that one party to a contract can take action on the basis of his asserted legal conclusion, until after he has notified the other party of his intention and had the validity of his conclusion certified by a court after an adjudication. You will recall in Sniadach that under Wisconsin procedure a creditor could assert that a debtor owed him money and thereupon obtain a court order without a hearing on the merits of the claimed debt or default, directing the employer of the debtor to pay a portion of the debtor’s wages to the creditor. In Fuentes the seller of a gas stove which had not been paid for attempted under Florida law to have the sheriff seize the stove and deliver it to the seller before a court determined that the Debtor was in default or was a debtor.

In my article I suggested that if these cases stood for this extreme position, it would be a dramatic change in existing commercial law, particularly in the law of secured transactions. I asked whether these cases should be considered valid.
a) a state statute which compels an employer to withhold asserted income tax from an employee’s wages before it has been determined whether any taxes are owed;
b) the UCC which authorizes a secured credit to repossess the collateral without judicial process on the creditor’s assertion of a default;
c) the UCC (in all but one jurisdiction) and real estate mortgage law (in about 25 to 30 jurisdictions) which authorize the secured creditor on his assertion of default by the debtor to sell the collateral after giving the Debtor notice but before a court has certified that there is a default;
d) the landlord and tenant law, developed in the DC and now widely copied, which authorizes a tenant to withhold rent payments on the tenant’s assertion that the landlord has breached some obligation of the lease, such as the obligation of habitability, before the landlord has been heard in court to determine whether or not there was a breach.

An endless list of everyday transactions could have been prepared, and I asserted that there is not a bilateral contract in existence in which one of the parties is not permitted by the contract or contract law to take action on the basis of his own asserted legal conclusion before a court has determined what the law applicable to the transaction is. Having produced the absurdity that I intended—a rule that nobody could act until a court authorized his action—I then sought to list a number of factors or principles which could be followed in distinguishing some situations from others.

I did not list as a principle a fact of which you are all aware: the last of these decisions was a 4-3 decision with two members of the present court, Powell and Rehnquist, not sitting. I know that some people in the commercial world are relying on this fact to get them out of their difficulty.

Not I. I think we must face the issue squarely. You will note that in all the situations I presented, the action taken before adjudication does not foreclose adjudication. If the tenant withholds rent, the landlord can bring a proceeding to determine whether the withholding was privileged. If the mortgagee threatens to exercise the power of sale on the mortgagor’s default, the mortgagor can bring an action to enjoin the sale until his defenses or claims are disposed of. So, what we are really talking about is the adversary system. In the adversary system somebody has to be an aggrieved party—that is, a plaintiff—and the question is whether one of the parties to a consensual arrangement can put the onus of an aggrieved party on the other.

In my article I suggested that the most congenial explanation of the cases was the conclusion that this can always be done, if the actor remains responsible for the consequences of his acts. Thus, self-help repossession of the automobile off the street by an agent of the creditor was alright and was different from the Fuentes case, where he enlisted the aid of a government official, thereby relieving himself from responsibility for the acts of the overzealous or rough sheriff. In the former case he was responsible for the acts of the agent, but not in the latter. I suggested that if the creditor wanted the immunity which action pursuant to court order gave him, then
he had to have all the trappings of a court order, that is, notice and hearing.

Every public interest law firm or legal aid office has a case in which a 70 year old lady lost her house or car or something, because the creditor, according to the old lady, seized the object and sold it without notifying her he was going to do so. Every creditor in the same or similar situation has a case in which he sent her two or three or more notices—even called on her and warned her of the threatened seizure and sale—and yet she ignored the notice and did not become really aggrieved until the discovery that the object had been taken away from her and sold. In a sense these two versions of the same event are the result of the anonymity and impersonality of a society with immense populations. But life has to go on, and immense populations should tell us that we cannot live with a system which requires judicial determination before any action.

What can we do? Until Chief Justice Kurland restores the principal that most law is not constitutional law, it is dangerous to suggest that one way out of the difficulty is to determine whether the actor’s conduct or his asserted privilege is unconscionable or is really an overkill.

What do I mean by an overkill or apparent overkill? There are many form mortgages around which have a clause which provides that on default the mortgagee may accelerate the debt and demand the entire unpaid balance “without notice to the debtor.” I regard this type of clause as an overkill clause.

Practically speaking there is no way the debtor can be made to pay the unpaid debt without notice, just as in a demand note you cannot in reality collect until you have made the debtor aware of your demand. It can only mean that if I, the creditor, err in giving the creditor enough notice, you the debtor agree that I am not to be responsible for the acts of my agent. The error does not make much difference when foreclosure is judicial foreclosure, but it makes a great deal of difference where a power of sale is used. I suggest that the risk of failure to give notice should fall on the creditor, but not to the extent of queering the sale. Debtors are better served by having a quick, cheap, and conclusive foreclosure procedure than by threatening the sanctity of all sales because of the chance of the occasional failure to give notice in fact. A monetary claim against the creditor for the mistaken or wrongful sale is enough, with certain exceptions.

The problem is that we may make our commercial system grind to a halt, if we have too much noticings. If it is highly likely that notice will be given, then there is no hard of hearing except at the debtor’s own choosing or negligence.